

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

**WILLIAM KEITH WININGEAR,
et al.,**

Plaintiffs,

v.

Civil Action No.: 2:12cv560-HCM-DEM

CITY OF NORFOLK, VIRGINIA
Defendant.

**DEFENDANT CITY OF NORFOLK'S REPLY MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER COMPELLING DISCOVERY**

COMES NOW the Defendant, City of Norfolk, Virginia ("City"), by counsel, and for its Memorandum in Opposition to Plaintiffs' Motion for Order Compelling Discovery states as follows.

INTRODUCTION AND FACTUAL STATEMENT

Plaintiffs accurately set forth the timeline of discovery requests in this case. The City's counsel and Information Technology personnel worked diligently through the summer months, in conjunction with Plaintiffs' counsel and Plaintiffs' expert, to provide Plaintiffs' counsel and expert with *direct access* to raw payroll and other electronic data, of which Plaintiffs acknowledge receipt. The City also made approximately 110 boxes of responsive documents as available to Plaintiffs' counsel for inspection and review as well as providing a representative sample of these documents. These documents have been available to Plaintiffs' counsel for a number of months, but no detailed inspection or review has been requested.

In October and November of 2013, both parties turned their focus to outstanding discovery requests on other topics. See Pltff. Brf. (Doc. 54) Ex. G (Doc. No. 54-7). Per Ex. H of Plaintiffs' Memorandum, the City undertook to search the email accounts for the individuals

identified by Plaintiff and using the extensive list of search terms provided by Plaintiff on or about November 4, 2013. See Id. Ex. H (Doc. No. 54-8). Coincidentally with these efforts, the City undertook a wholesale migration of its email system from a server-based system to a “cloud” based system utilizing Microsoft Outlook Professional 2013, which caused additional delays in both the City’s ability to run the searches (each of which takes approximately one hour) and City counsel’s ability to review the search results prior to production. As noted in Plaintiffs’ Memorandum, City’s counsel produced several responsive email account files on December 23, 2013, which response was and is acknowledged to be partial. See Pltff. Brf. (Doc. No. 54) at 3 n.1. This process is ongoing and the undersigned counsel is making every effort to complete its email production in accordance with the Federal Rules of Civil Procedure and pursuant to its timely objections to Plaintiffs’ discovery requests as soon as possible. Many of the emails produced by the search are non-responsive and the volume of the emails is largely a factor of the use of more than seventy search terms requested by Plaintiffs’ counsel. See Letter of November 4, 2013 and search term list attached as Exhibit A.

City’s counsel is unaware of the particular emails identified by Plaintiffs in their Memorandum at page 3, the senders of which are unidentified therein. See Pltff. Brf. (Doc. No. 54) at 3. The undersigned counsel advised all City personnel known to have knowledge or information about this case to preserve any documents, emails, or other records concerning the payment of overtime or overtime requests as of the time of filing of the case in October of 2012. City counsel conducted the email search via its Information Technology division without notice to any other division or individual.

City's counsel is in the process of compiling full responses to Plaintiff's written discovery requests in accordance with the Federal Rules of Civil Procedure and pursuant to its timely objections thereto.

City's counsel has acted at all times in good faith and maintained regular and timely communication with Plaintiffs' counsel as set forth in Plaintiffs' Memorandum and exhibits thereto. The City has provided huge amounts of raw electronic data to include all requested pay and compensation data as well as the full text of all current and historic policies, directives, and other related documents as well as an index of those materials. Over 150 boxes of responsive documents have been made available and remain available for inspection and review. By their own admission, Plaintiffs come to the Court with unclean hands concerning their own untimely and incomplete responses to the City's discovery requests which had been served in May 2013 within "a couple of days" of Plaintiffs' requests at issue in the pending Motion. See Pltff. Brf. Ex. G (Doc. No. 54-7). The City accordingly objects to Plaintiff's prayer for attorneys' fees and costs in conjunction with the Motion.

CONCLUSION

For the foregoing reasons, the City requests that any Order entered with respect to this Motion provide it with a reasonable time period to provide complete responses, while preserving the City's timely objections, to Plaintiffs' First and Second Interrogatories and Requests for Production of Documents.

Respectfully submitted,

CITY OF NORFOLK

By: /s/ Andrew R. Fox

Andrew R. Fox, Deputy City Attorney
Virginia Bar Number 68154
Heather A. Mullen, Deputy City Attorney
Virginia Bar Number 29239
Attorneys for City of Norfolk
City of Norfolk Department of Law
810 Union Street, Room 900
Norfolk, VA 23510
Telephone: (757) 664-4529
Facsimile: (757) 664-4201
Andrew.fox@norfolk.gov
Heather.mullen@norfolk.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of filing (NEF) to the following:

James H. Shoemaker, Jr.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
jshoemaker@pwhd.com

Jason E. Messersmith
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
jmessersmith@pwhd.com

Patricia A. Melochick
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
pmelochick@pwhd.com

Richard J. Serpe
Law Offices of Richard J. Serpe, P.C.
Crown Center, Suite 310
580 East Main St.
Norfolk, VA 23510
rserpe@serpefirm.com

Cindra Dowd
Law Offices of Richard J. Serpe, P.C.
Crown Center, Suite 310
580 East Main St.
Norfolk, VA 23510
cdowd@serpefirm.com

/s/ Andrew R. Fox
Andrew R. Fox, Deputy City Attorney
Virginia Bar Number 68154
Attorney for City of Norfolk
City of Norfolk Department of Law
810 Union Street, Room 900
Norfolk, VA 23510
Telephone: (757) 664-4529
Facsimile: (757) 664-4201
Andrew.fox@norfolk.gov